No. 00-191

Supreme Court, U.S.
FILED
JAN 12 2001

JAN 12 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

FEDERAL ELECTION COMMISSION,

Petitioner,

—v.—

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF COLORADO IN SUPPORT OF RESPONDENT

Mark J. Lopez
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Joel M. Gora
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 8

ARGUMENT 11

PARTY COORDINATED EXPENDITURES MAY NOT BE RESTRICTED CONSISTENT WITH THE FIRST AMENDMENT 11

A. The Challenged Limits On Coordinated Expenditures By Political Parties Impair Substantial Rights Of Free Speech And Association 13

B. Party Coordinated Expenditures Present No Threat Of Actual Or Perceived Corruption 15

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) 1

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982) 2

Buckley v. Valeo, 424 U.S. 1 (1976) . . . . . *passim*

California Democratic Party v. Jones, 530 U.S. __, 120 S.Ct. 2402 (2000) 10, 14, 17

California Med. Ass'n v. Federal Election Comm'n, 453 U.S. 182 (1981) 20

California Medical Association v. FEC, 453 U.S. 182 (1981) 1

Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) . . . . . *passim*

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989) 12

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986) 1

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 1

Page

Meyer v. Grant, 486 U.S. 414 (1988) 1

Missouri Republican Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000) 13

Nixon v. Shrink Missouri Gov't PAC, 528 U.S. __, 120 S.Ct. 897 (2000) . . . . . *passim*

Ray v. Blair, 343 U.S. 214 (1952) 17

Rutan v. Republican Party, 497 U.S. 62 (1990) 17

Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) 12

Statutes

Federal Election Campaign Act

2 U.S.C. §441a(a)(1)(A) 19
2 U.S.C. §441a(a)(1)(B) 19
2 U.S.C. §441a(a)(7)(B)(I) 3
2 U.S.C. §441a(a)(8) 19
2 U.S.C. §441a(d) 11
2 U.S.C. §441a(d)(3) 3, 5, 8, 15, 16

INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Colorado is one of its statewide affiliates.

Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions to defend the right of individuals and groups to engage in political expression without regard to party affiliation or partisan interest. More specifically, because of our belief in the primacy of political speech, the ACLU has consistently opposed efforts to limit speech as a means of addressing perceived inequalities in the electoral system. Based on that view, the New York Civil Liberties Union challenged the constitutionality of key provisions of the Federal Election Campaign Act (FECA) as one of the plaintiffs in *Buckley v. Valeo*, 424 U.S. 1 (1976). The ACLU has also opposed such efforts to limit speech by participating as *amicus curiae* in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), as well as many other cases, including *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. __, 120 S.Ct. 897 (2000); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990); *Meyer v. Grant*, 486 U.S. 414 (1988); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. National Conservative Political Action Committee*, 470 U.S. 480 (1985); and *California Medical Association v.*

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

FEC, 453 U.S. 182 (1981). In addition, the ACLU has represented various groups and individuals, of all ideological persuasions, whose political advocacy has been prohibited, restricted or inhibited by campaign finance laws. *See, e.g.*, *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982).

In our view, this case represents yet another well-intentioned but misguided effort to limit the First Amendment right of political parties to work with their candidates in pursuit of a common political agenda. Such activity lies at the very core of what political parties exist to do, while the risk that a party may corrupt its own candidate, whatever that may mean, is minimal at best. Furthermore, the stabilizing role that political parties have traditionally played in the American political system will be further diminished if parties are barred from coordinating their strategy, and hence their expenditures, with candidates who are running under a party banner. *Amici* therefore respectfully urge the Court to affirm the judgment of the Tenth Circuit below.

STATEMENT OF THE CASE

This case comes back to the Court following a remand from its earlier decision in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996)(hereinafter *Colorado I*). In that case, which arose out of an FEC enforcement action, the Court held that independent expenditures by a political party could not be regulated as contributions by irrebuttably presuming that such expenditures are coordinated with the candidate on whose behalf they were made. Speaking for a plurality of the Court, Justice Breyer concluded that FECA's restrictions on independent party expenditures impinged on "'core' First Amendment activity." *Id.* at 616. The plurality further distinguished the restriction on independent party expenditures

from the individual contribution limits upheld in *Buckley* by noting that the government failed to "point to record evidence or legislative findings suggesting any special corruption problem in respect to independent party expenditures." *Id.* at 618. By a 7-2 vote, the Court then held that the limits on independent party expenditures were unconstitutional.

The issue now before the Court involves the constitutionality of government efforts to restrict campaign expenditures by a political party that the party in fact coordinates with its chosen candidate. Although that issue had been before the Court in *Colorado I*, the Court declined to consider it for "prudential" reasons. *Id.* at 623. In particular, the Court found that the issue of coordinated party expenditures had not been fully developed in the lower courts, either factually or legally, and accordingly sent the case back for further proceedings.[2]

Four Justices in *Colorado I* would have reached the broader issue and enjoined enforcement of the party expenditure provision on the ground that the anti-corruption rationale on which the Court has relied in its campaign finance decisions is inapplicable where a party spends its lawfully obtained contributions to support the positions of its own

---

[2] Coordinated expenditures undertaken by individuals, as well as those by political associations other than political parties, are treated strictly as contributions under federal law and subject to the same limits as direct contributions. 2 U.S.C. §441a(a)(7)(B)(I). *See Colorado I*, 518 U.S. at 610. The separate statutory provision at issue in this case governs coordinated expenditures by political parties and permits expenditures which exceed the amount the party would otherwise be permitted to contribute to a candidate directly. §441a(d)(3). For senatorial campaigns, that provision fixes the expenditures cap at the greater of $20,000 or 2 cents multiplied by the voting age population of the state, as indexed for inflation. In 1998, the average amount expended by the national committee in a senate election ranged from a low of $130,000 in Alaska to a high of $3,035,874 in California, according to FEC data.

candidate, whether or not that expenditure is made in concert with the candidate. *Colorado I*, 518 U.S. at 626-31, 631-48 (opinions of Kennedy and Thomas JJ., concurring in judgment and dissenting in part). The consensus view of the concurring Justices was that parties and candidates have traditionally worked together to achieve their common goals and, when they engage in that work, there is no risk to the integrity of our political system. To the contrary, the danger to it lies in government suppression of such activity. *Id.*

Two Justices in dissent maintained that Congress was within its power to regulate all party spending -- including independent expenditures. *Colorado I*, 518 U.S. at 648-50 (Stevens, J., dissenting). In reaching this conclusion, the dissent agreed with the assessment of the plurality and concurring opinions that "[a] party shares a unique relationship with the candidate it sponsors because their political fates are inextricably linked." *Id.* at 648. Unlike the other Justices, however, the dissenting Justices believed that the influence this interdependency leads to is illegitimate. *See id.*

On remand, both sides offered submissions on the question of whether coordinated expenditures by political parties resulted in corruption or the appearance of corruption. *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 41 F.Supp.2d 1197 (D. Colo. 1999). Based on that evidence, the district court granted summary judgment in favor of the Colorado Republican Party. *Id.* at 1214. The district court began its analysis by acknowledging the point about which there was broad agreement among the *Colorado I* opinions -- that there is an intimate, interdependent relationship between political parties and their candidates. *Id.* at 1209-10. Because of this well-established feature of American politics, the district court concluded that "communications via coordinatcd party expenditures implicate core First Amendment concerns." *Id.* at 1210.

Turning to the question of corruption, the court then held that "the FEC . . . failed to offer relevant, admissible evidence which suggests that coordinated party expenditures must be limited to prevent corruption or the appearance thereof." *Id.* at 1213. Rejecting the argument that contributors to parties would force the party committee to compel a candidate to take a political position, the court noted that most of the FEC's allegations concerned soft-money contributions, which may not be used for coordinated expenditures. *Id.* at 1204 n.7, 1211. Examining the effect of hard money contributions, the court concluded that "[t]he evidence in the record . . . demonstrates that at least the majority of hard money received by the parties is in the form of small (*i.e.*, less than $100) contributions from individual donors." *Id.* at 1202. And even with respect to large party donors, the court held, the "facts in the record" demonstrated that the limits on hard money contributions make "contributor-to-party-to-candidate pressure . . . an unlikely avenue of corruption." *Id.* at 1211. Moreover, like the concurring opinions in *Colorado I*, the court concluded that the relationship between parties and their candidates made corruption by the party itself, rather than by a party donor, a practical impossibility. *Id.* at 1212. Because the district court concluded on the facts that coordinated expenditures by political parties did not lead to corruption or the appearance thereof, it held that the First Amendment prohibited restrictions on such expenditures.

The Tenth Circuit affirmed in an opinion which strictly adhered to *Buckley* and its progeny, *Federal Election Comm'n v. Colorado Republican Fed. Campaign Comm.*, 213 F.3d 1221 (2000), and which specifically incorporated this Court's recent decision in *Nixon v. Shrink Missouri Gov't PAC*, 120 S.Ct. 897 (2000). The court of appeals concluded that §441a(d)(3) does not satisfy the standard consistently applied by this Court, which establishes that the

only acceptable justifications for limits on campaign contributions to a candidate are corruption or the appearance of corruption. Adopting the view already expressed by four Justices of this Court, the court of appeals rejected the notion that any influence a political party exercises over its candidate through coordinated spending decisions involves such corruption or represents a subversion of the political process. *Id.* at 1231, 1233.

Noting at the outset that FECA treats coordinated expenditures as contributions, *see Federal Election Comm. v. National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985), the court of appeals cast the issue as one involving contributions and set out to decide whether the regulation of coordinated party expenditures was "closely drawn" to match a "sufficiently important interest," *Shrink*, 120 S.Ct. at 904 (quoting *Buckley*, 424 U.S. at 25, 30). The court admitted some difficulty in applying the *Buckley* standard governing contribution limits for the reasons expressed in Justices Kennedy's and Thomas' concurring opinions in *Colorado I*, 518 U.S. 604,[3] but held that the party expenditure provision failed even the more deferential standard established in *Buckley* and restated in *Shrink Missouri*.

Applying the standard for evaluating contribution limits, the court of appeals considered and rejected each of the FEC's arguments advanced in support of the expenditure provision. The FEC first argued that contributors to a political party -- wealthy individuals or political action committees -- can unduly influence a political party and thereby corrupt the political process. The Tenth Circuit acknowledged that corporations and others may indeed exert influence over the legislative process, but the FEC's evidence failed to demonstrate that *parties* undermined the integrity of the electoral process. *Id.* at 1229. The court observed that Congress recognized the danger of corporate influence by adopting contribution limits in the first place, but stated that if the FEC finds the current limits on corporate contributions inadequate to curb undue influence, it should make its case to Congress. "We will not validate limits on the protected speech of a political party as a back-door means of stemming corporate involvement in the legislative process." *Id.*

The FEC additionally maintained that parties can be a corrupting influence because they raise millions of dollars in "soft money" from corporations, unions, and other interests. Party leaders then pressure lawmakers to go along with policies supported by those contributors, the commission argued. In response, the Tenth Circuit noted that FECA regulates only "hard money," and that the influence of soft money is in any event irrelevant to the present controversy because coordinated party expenditures can only be funded by hard money contributions. "We appreciate the FEC's concern over soft money, but this proceeding does not present the opportunity for soft money reform." *Id.* at 1230.

The FEC's second theory -- that a cap on coordinated expenditures keeps party officials from using the party's spending authority to further their own interests -- "has the appeal of directly targeting the source of alleged corruption," the court acknowledged. But the underlying premise "gravely misunderstands the role of political parties in our democracy." Political parties are "simply too large and too diverse to be corrupted by any one faction," the court stated. *Id.* at 1231.

Finally, the FEC argued that the party expenditure provision prevents evasion of FECA's other contribution limits.

---

[3] As the court of appeals explained, "a party speaks in large part through its identified candidates; candidates, in significant measure, speak for their political parties." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1227.

The court of appeals agreed that an individual's channeling of money to a specified candidate through the party would threaten the integrity of the individual contribution limits. However, it held that Congress took care of this possibility by treating such earmarked contributions as going directly to the candidate. *Id.* at 1232.

The court concluded that §441a(d)(3) impermissibly interferes with political parties' First Amendment rights and is not "closely drawn" to address corruption in the political process. *Buckley* concerned limits on contributions by individuals, candidates, and PACs and said nothing about the First Amendment implications of limiting party speech on behalf of its candidates, the Court said. *Id.* at 1232-33. To bring political parties into the corruption framework would require an extension of precedent that is "not warranted by the [Supreme] Court's post-*Buckley* FECA jurisprudence and would betray the historical importance of political parties." *Id.* at 1232.

SUMMARY OF ARGUMENT

This case presents an important but limited issue. The question before the Court is whether the First Amendment prohibits restrictions on expenditures by political parties made in coordination with their candidates. This is not a case about soft money. Under FECA, coordinated expenditures by political parties may be made only with hard money, and the parties have neither challenged the use restrictions on soft money nor presented any evidence suggesting that soft money is in fact used by political parties for coordinated spending. Moreover, this is not a case about other hard money restrictions contained in FECA -- such as the limits on direct contributions by individuals to parties, or by parties to candidates. In the past, this Court has stressed the need to proceed cautiously and focus on the narrow issue at hand when addressing the constitutionality of a specific campaign finance regulation. *See Shrink*, 120 S.Ct. at 909; *Colorado I*, 518 U.S. at 623-26 (plurality opinion). We urge the Court to do so again here.

Even still, it is difficult to fit the limitation on coordinated spending by political parties into the conceptual categories set forth in *Buckley*. But, like the court of appeals, we do not believe it is necessary to resolve that conundrum in order to resolve this appeal. In *Buckley*, the Court upheld the contribution limitation at issue only because it left political "communication significantly unimpaired," *Shrink*, 120 S.Ct. at 904 (discussing *Buckley*, 424 U.S. at 20-21), and furthered the government's compelling interest in preventing corruption, *see Buckley*, 424 U.S. at 25-29. The coordinated party expenditure limit at issue in this case does neither.

First, unlike the contribution limits considered in *Buckley*, the limit on coordinated party expenditures plainly implicates core First Amendment values. As this Court has recognized, political parties play a unique role in the American political system. They provide stability to the democratic process and a collective voice for party members. In our pluralistic society, the major political parties necessarily embrace a broad political spectrum. But they also represent a distinct set of political beliefs. A party communicates those beliefs in at least two closely related ways: by selecting and supporting candidates who reflect the party's views, and by relying on those candidates, as standard bearers, to speak for the party. Preventing a party from coordinating its spending with its candidates both infringes on the ability of that party to support its candidates and stifles its ability to use its candidates to communicate the party's message.

Second, imposing a limit on coordinated party expenditures does nothing to further the government's recognized

interest in preventing corruption or the appearance of corruption. In our democratic system, there is nothing corrupting about party expenditures designed to help a candidate spread the party's message as its standard bearer. Nor is there anything improper about attempts by the party to shape the candidate's views to the extent that the candidate's views may differ from the party platform. What the government characterizes as corruption is nothing more than party politics. Only last Term, this Court reaffirmed the right of political parties to select their own candidates unhampered by government efforts to shape those ideological choices. *See California Democratic Party v. Jones*, 530 U.S. __, 120 S.Ct. 2402 (2000). Once having made those choices, the parties should be equally free to decide whether the electoral chances of their candidate would be better enhanced by independent expenditures or coordinated expenditures. That, and nothing more, is what is at issue in this case.

The substantial record evidence developed on remand contradicts the government's contention that party donors corrupt candidates by forcing the parties to utilize coordinated party expenditures to induce candidates to support the interests of those large donors. The bulk of hard money raised by political parties -- the only money that may be used for coordinated spending -- is received in very small amounts, averaging less than $40. Moreover, there is no evidence suggesting that larger donors, who may give up to $20,000 in hard money, have been able to use those hard money contributions to exert improper contributor-to-party-to-candidate pressure. Even if the FEC believes that such improper pressure exists, it may not restrict speech by political parties as a back-door means of correcting a perceived problem related to the federal limits on the money that an individual or PAC may contribute to a party.

As the Solicitor General aptly points out, Congress enacted §441a(d) in order to "limit the role of [political] parties vis-a-vis other participants in ongoing public policy debates." Pet. Br. at 16. The First Amendment simply does not permit Congress to level the playing field of political debate in this manner. *See Buckley*, 424 U.S. at 48-49.

ARGUMENT

PARTY COORDINATED EXPENDITURES MAY NOT BE RESTRICTED CONSISTENT WITH THE FIRST AMENDMENT

Since *Buckley v. Valeo*, 424 U.S. 1 (1976), every campaign finance case has begun by characterizing the challenged regulation as either a contribution or expenditure. Limits on expenditures have been generally struck down. Limits on contributions have been upheld only if they plausibly advance the recognized interest in preventing corruption or the appearance of corruption.

The basis for this distinction was set forth in *Buckley*. "[R]estrictions on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their explanation, and the size of the audience realized." *Id.* at 19. By contrast, the Court wrote in *Buckley*, "[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." *Id.* at 20.

As the Tenth Circuit recognized, this case does not fit comfortably within that conceptual model. To be sure, coordinated expenditures are generally treated like contributions under the campaign finance laws. *See* n.2, *supra*. But the justification for subjecting contributions to greater regu-

lation than expenditures -- that contributions represent only symbolic expression or, alternatively, a form of speech by proxy -- fails to capture the unique and undeniable relationship between a candidate and its party.

Both on the ballot and in the public mind, a candidate speaks for the party and the party speaks through its candidate. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989). That is not to say that a party and its candidate must see eye-to-eye on every issue; they rarely do. The country is too complex and our political parties are too diverse to expect or require a total identity of interests. Nevertheless, parties are unlike other interest groups and unlike other political associations that may develop around particular ideologies or causes. The purpose of a political party is to elect candidates, and candidates rely on political parties to help them get elected. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 216 (1986). In a very real sense, therefore, the message of a political party is most clearly expressed by the candidates it selects to run under its banner. For a political party, the candidate is the message, and support for the candidate is the way in which the party communicates its beliefs.

Thus, if this Court feels compelled by its jurisprudence to characterize coordinated party expenditures as either a contribution or an expenditure, we believe the expenditure label is the more appropriate one since any restriction on coordinated party expenditures directly affects the traditional ability of the party to communicate is own chosen message through its own chosen medium. In our view, however, this case should not be decided by labels. Rather, we think the case should be decided by asking two fundamental questions. First, do the limits on coordinated party expenditures impair substantial speech and associational interests? If so, has the government demonstrated on these facts a sufficient risk of corruption to justify the abridgment of First Amend-

ment rights? We respectfully submit that the answer to both questions is clear, and that the Tenth Circuit properly struck down the challenged restrictions as unconstitutional on the record before it.

A. The Challenged Limits On Coordinated Expenditures By Political Parties Impair Substantial Rights Of Free Speech And Association

In *Buckley*, this Court concluded that an individual contribution limitation constitutes "only a marginal restriction upon the contributor's ability to engage in free communication" because it "involves little direct restraint on . . . political communication" and "permits the symbolic expression . . . evidenced by a contribution." 424 U.S. at 20-21. As the court of appeals correctly held in this case, however, "a limit upon the amount a party can spend in coordination with its candidates certainly entails more than a 'marginal restriction' on the party's free speech." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d. at 1227 .

The two principal reasons that the *Buckley* Court concluded that individual contribution limits "entail[] only a marginal restriction" on speech do not apply to coordinated expenditures by parties. 424 U.S. at 20. The Court's evaluation of the speech interest affected by individual contribution limits turned crucially on its conclusion that an individual's contribution to a candidate constitutes only a "symbolic expression" of support. *Id.* at 21. As Justice Kennedy noted in *Colorado I*, however, "[p]arty spending 'in cooperation, consultation, or concert with' its candidates of necessity 'communicate[s] the underlying basis for the support,' *i.e.*, the hope that he or she will be elected and will work to further the party's political agenda." 518 U.S. at 629-30 (Kennedy, J., concurring in the judgment and dissenting in part)(citing *Buckley*, 424 U.S. at 21); *cf. Missouri Republi-*

can Party v. Lamb, 227 F.3d 1070 (8th Cir. 2000)(holding that even a party contribution amounts to more than the symbolic expression of an individual contribution). In other words, coordinated spending provides an ideological endorsement and carries a philosophical imprimatur that an individual's contribution does not.

Nor does the *Buckley* Court's reasoning that "the transformation of contributions into political debate involves speech by someone other than the contributor" apply in any meaningful way to party coordinated spending. 424 U.S. at 21. Unlike contributions, "a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily" represents a direct and substantial restraint on that person or group's speech. *Id.* at 19. And while a party's decision to coordinate its spending on political communication with its candidate may change the quality of that communication to some degree, the "practical identity of interests between the two entities" makes clear that coordinated expenditures are much more than proxy speech. *Colorado I*, 518 U.S. at 630 (opinion of Kennedy, J.)

Political parties hold a venerable place in American politics. *See generally California Democratic Party v. Jones*, 120 S.Ct. 2402. One reason that political parties hold such an "important and legitimate role . . . in American elections," *Colorado I*, 518 U.S. at 618 (plurality opinion), is that they serve to promote core First Amendment values. "The First Amendment embodies a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs." *Id.* at 629 (Kennedy, J., concurring in the judgment and dissenting in part)(citations and internal quotation marks omitted).

The party coordinated expenditure limitation undeniably hampers the ability of parties to support their chosen candidates. After all, "it would be impractical and imprudent, to say the least, for a party to support its candidates without some form of 'cooperation' or 'consultation.'" *Id.* at 630. Uncoordinated spending might well be counterproductive. Moreover, without coordinated spending it becomes much more difficult for parties to use their resources to have their candidates, as standard bearers, speak for them. The ultimate effect of these restraints is that the limitation on coordinated party spending interferes with the ability of parties to promote their members' shared political beliefs. As a consequence, it also undermines the traditional role of political parties in fostering robust political debate.

B. Party Coordinated Expenditures Present No Threat Of Actual Or Perceived Corruption

In addition to interfering with more substantial speech interests than those affected by the contribution limit in *Buckley*, §441a(d)(3) fails entirely to advance the only interest that this Court recognized in *Buckley* as sufficiently compelling to justify that contribution limit -- the prevention of corruption or the appearance of corruption. *See Buckley*, 424 U.S. at 25-29, 48-49; *Shrink*, 120 S.Ct. at 905; *Colorado I*, 518 U.S. at 609. For as the Tenth Circuit held and several members of this Court have concluded, party coordinated expenditures present no real possibility of corruption. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1229-33; *Colorado I*, 518 U.S. 604 (Kennedy, J., and Thomas, J., concurring in the judgment and dissenting in part).

Indeed, the very notion of a party corrupting its candidate through coordinated support is both politically and le-

gally incoherent.[4] In order for an entity to influence a candidate impermissibly, either through *quid pro quo* corruption or through the more subtle forms of improper influence discussed in *Shrink*, the candidate and the entity must have interests that are separate and distinct. If their interests are aligned, there will be no loyalty to purchase and no favors to seek. That is the situation here. As Justice Kennedy wrote in *Colorado I*, there is a "practical identity of interests" between candidates and their parties. 518 U.S. at 630; *see also id.* at 631-48 (opinion of Thomas, J.). Even the government itself argued explicitly in *Colorado I* that there is a clear identity of interests between a political party and its candidates; it went so far as to state that "a party and its candidate are identical." *See id.* at 622 (plurality opinion) (setting forth the government's position). Accepting the government's view, this close alignment of interests surely undermines the likelihood of corruption, whatever that may mean in the context of a party and its candidate.

The government's failure to articulate any persuasive explanation of the sort of "corruption" it fears in communications between a party and its candidate exposes the constitutional flaw at the heart of its case. To the extent that a candidate and party's interests do differ, there is nothing improper about the party attempting to influence the candidate's positions. Far from constituting corruption, such efforts at influence are both commonplace and appropriate. *See Ray v. Blair*, 343 U.S. 214 (1952)(a party may require its candidates for the electoral college, as a *quid pro quo* for the party's nomination as an elector, to pledge to vote automatically for whatever presidential ticket the party ultimately nominates).

As discussed above, political parties in America have traditionally operated as vehicles to communicate and implement the shared political beliefs of their members. Parties accomplish both of these goals in large part by selecting and supporting candidates to serve as standard bearers for the party.[5] Once elected, these candidates are expected to fulfill their role as a selected standard bearer by working to advance the party's agenda through legislation or executive branch action. For this reason, it makes little sense to view a party's urging its own candidate to adhere to the party agenda as a form of "improper" influence. Indeed, it is precisely through such activity that parties are able to represent and promote their members' shared political beliefs. If they could not promote those shared beliefs effectively, political parties would quickly risk marginalization. That result would neither reduce corruption nor promote good government. *See, e.g., Rutan v. Republican Party*, 497 U.S. 62, 106-07 (1990)(Scalia, J., dissenting)(discussing the traditional role of political parties in furthering the will of broad and inclusive majorities); *see also California Democratic Party v. Jones*, 120 S.Ct. 2402.

---

[4] In addition to contending that there is a danger that a candidate will be corrupted by his or her party, the government asserts that §441a(d)(3) is constitutional because it is necessary to prevent the possibility of corruption by the individual party leaders who control the expenditure of party funds. The government, however, points to no evidence even suggesting that there is any real threat of such corruption. *See* Gov't Br. at 33-34. Even were there a danger of party leaders subverting the will of party members, the Tenth Circuit held that there is no evidence that rank-and-file members will not quickly replace corrupt leaders. *See Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1231.

[5] As discussed in Point I, *supra*, coordinated party spending simply reflects the party's support of its standard bearer as a candidate. To be sure, a successful candidate is likely to use her power as an elected official to implement her party's platform. But in our system, it is assumed that he or she will do so regardless of how much or how little the party spends to promote the candidate's election. The government has introduced no evidence to the contrary.

This close relationship between parties and their candidates reveals yet another serious difficulty associated with the government's argument. Were this Court to hold that Congress may regulate coordinated expenditures by parties, the combination of that holding and the holding in *Colorado I* would force lower courts to make the difficult determination whether particular party expenditures are in fact coordinated with candidates. Because parties and their candidates are so closely linked, such an inquiry may be a practical impossibility. Even if such an inquiry is feasible, it inevitably would involve an intrusive and constitutionally troubling investigation of the inner workings of political parties.

In addition to arguing that candidates may be corrupted by their parties, the government asserts that the limit on coordinated party spending must be upheld to prevent large hard money contributors from exercising undue influence on the party's spending decisions. The record indicates otherwise. As the court of appeals noted, coordinated expenditures must be supported by hard money and the hard money raised by the parties comes from individuals who give, on average, less than $40. *Colorado Republican Fed. Campaign Comm.*, 213 F.3d at 1231. Even with respect to the small percentage of donors who give substantially more, and whose contributions are subject to the disclosure requirements, the record belies the government's contentions. Rather than suggesting that parties funnel money to candidates at the behest of large donors seeking influence, the evidence indicates "that the primary consideration in allocating funds is which races are marginal -- that is, which races are ones where party money could be the difference between winning and losing." *Colorado Republican Fed. Campaign Comm.*, 41 F.Supp.2d at 1203.

Perhaps because of the absence of evidence supporting its position, much of the evidence introduced by the government in the district court apparently related to unregulated

soft-money contributions to political parties. But this is not a case about soft money contributions or any other aspect of campaign finance law. Thus, the simple fact that "[n]one of the FEC's examples [concerning alleged donor corruption] involve coordinated expenditures" is fatal to the government's argument. *Id.* at 1211.

In an attempt to skirt the absence of any evidence that donors use hard money contributions to parties to force parties to use coordinated expenditures to exert improper pressure on candidates, the government argues that the party expenditure provision should be upheld to prevent donors from evading FECA's individual contribution limits. It is true that while an individual may contribute only $1000 directly to the candidate for federal office, *see* 2 U.S.C. §441a(a)(1)(A), he or she may contribute up to $20,000 of hard money to a national political party, *see* §441a(a)(1)(B). The FEC claims that if the coordinated spending limit is struck down, individuals will circumvent the $1000 limit by contributing $20,000 to a political party with the expectation that this money be used to support a particular candidate. But as the government is forced to acknowledge, Congress anticipated such circumvention and included a specific provision in FECA -- §441a(a)(8) -- to prevent it. That section directly prohibits evasion of the candidate contribution limits by prohibiting "pass through" contributions -- that is, contributions to a party that are earmarked, either formally or informally, for a particular candidate. Consistent with the First Amendment's requirement that government take care not to infringe speech rights unnecessarily or excessively, it is plain that "[v]igilant enforcement of §441a(a)(8), rather than severe abridgement of party speech, is a more appropriate and direct means to safeguard the integrity of the individual contribution limits." *Colorado Republican Fed. Campaign Comm.*, 213 F.3d. at 1232.

The government suggests that the prohibition on ear-

marking is not sufficient to prevent donors from circumventing the individual contribution limits. *See* Gov't Br. at 31 n.14. But while the government's contention may support the Court's conclusion that other contribution limits are necessary to prevent individuals from circumventing the limits on the amount that they may give to any one candidate, *see Buckley*, 424 U.S. at 38 (holding that the $25,000 aggregate limits on contributions by individuals prevents "huge contributions" of hard money to the candidate's political party); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. at 193-99 ($5,000 limit on contributions to PACs), it does nothing to demonstrate that a limitation on party expenditures is also necessary to prevent such evasion. The government bears the burden of proof on this point, but it has introduced no evidence that these other mechanisms are insufficient.

Moreover, even were there evidence that the $25,000 aggregate limit or the $20,000 limit on contributions to parties by individuals permitted circumvention of the $1,000 individual-to-candidate limit, such evidence would suggest at most that Congress may constitutionally lower these other contribution limits.[6] Congress, however, has chosen not to do so. While Congress may be entitled to deference when it fine-tunes contribution limits, *see, e.g., Shrink*, 120 S.Ct. 897, the Court need not and should not defer to a congressional judgment that burdens a substantial speech interest of political parties as a back door means of stemming a potential problem that is unrelated to the speech right that is infringed. As both the district court and the court of appeals concluded below, such a scheme is unconstitutional.

[6] This Court's cases upholding limits on aggregate contributions or contributions to political associations did so on the grounds that those limits were necessary to prevent individuals from circumventing the limits on giving to any one candidate. *See Buckley*, 424 U.S. at 38 ($25,000 aggregate limit on contributions); *California Med. Ass'n v. Federal Election Comm'n*, 453 U.S. at 193-99 ($5,000 limit on contributions to PACs).

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Tenth Circuit should be affirmed.

Respectfully submitted,

Mark J. Lopez
(*Counsel of Record*)
Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Joel M. Gora
250 Joralemon Street
Brooklyn, New York 11201
(718) 780-7926

Dated: January 12, 2001